

**From:** Jim Prendergast  
**To:** DOJ comments  
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Americans for Technology Leadership Tunney Act Submission

On behalf of Americans for Technology Leadership (<<http://www.techleadership.org/>>), I am writing to express our support for the bipartisan settlement reached between your department, Microsoft and nine of the state attorneys. As an organization that represents thousands of consumers, as well as numerous technology companies and trade associations, we believe this settlement is a tremendous step forward. It accurately addresses the finding of the Court of Appeals and allows Microsoft and the rest of the industry to get back to developing new technologies.

This settlement is the result of extremely hard work on the part of many individuals from Microsoft, the Department of Justice and the state attorneys general, as well as the mediators. Everyone had to make concessions in order to bring this chapter to a close and let the technology industry get back to work.

I would also like to commend the Department of Justice for their efforts during the settlement process. ATL has always been concerned with the level of involvement in the case by Microsoft's competitors. Assistant Attorney General Charles James echoed these concerns in November.

"Some of the loudest and most vocal criticism has come from some of Microsoft's competitors," said (Antitrust Chief Charles) James, without naming the corporate critics, which include AOL Time Warner Inc., Sun Microsystems Inc. and Real Networks Inc. "I don't think we have ever had competitors be quite so aggressive in asking that we serve their interests. Our job as antitrust enforcers is not to level the playing field mid-game." James distinguished between the "real Microsoft case" and "Microsoft, the public spectacle." He said the appeals court's ruling that Microsoft illegally protected the monopoly its Windows operating system enjoys doesn't support the "broad-scale emasculation of the company" that rivals sought.

Bloomberg News,

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Resisting the fierce lobbying attempts by these companies could not have been easy, but your perseverance paid off as evidenced by a reasonable settlement that addresses the concerns found by the Court of Appeals. I'm sure you will receive several comments from well-known commentators such as Judges Kenneth Starr and Robert Bork. Their work on behalf of Microsoft's competitors is impressive, but it differs from the feelings of the millions of consumers and the thousands of small technology companies who have been hurt by this case.

The American public has always believed that this case should have been settled or brought to a close and that they have overwhelmingly supported the settlement that was reached. Polling commissioned by our organization has found that in July over 70% of the American believed that it was time for this case to come to an end. Since the settlement was reached similar numbers have supported the agreement and found it to be "fair and reasonable." These views have been found by a number of other polls conducted by Gallup, Ipsos-Reid, and other organizations.

Countless members of Congress from both parties, who came out in support of the agreement as well as many newspaper editorial pages from across the ideological and geographic spectrum, have echoed these sentiments.

A fair and reasonable settlement is clearly preferable to continued litigation. The case against Microsoft has already gone on for nearly four years and has cost both Microsoft and the government millions of dollars. The litigation has caused Microsoft and the entire technology industry to focus on litigation, instead of creating better products and serving the needs of consumers. Given the state of the economy, the last thing we need

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is continued litigation.

The settlement reached in this case is a responsible agreement, which puts this entire case behind us. It addresses specific findings of the Court of Appeals and in some cases imposes restrictions even beyond those findings. In fact, Attorney General Ashcroft pointed out that this settlement "exceeds the kind of relief that was signaled in the Court of Appeals opinion of earlier this year."

Many corporate rivals of Microsoft had hoped that remedies imposed on the company would be much more far-reaching and extreme for their own interests, they are simply not called for given the ruling by the Court of Appeals and by the standards of antitrust law. Our antitrust laws and our courts are not supposed to be used by a few powerful companies to harm their rivals and do to them in the courts what they cannot do in the marketplace. By attempting to scuttle settlement, these companies choose litigation over innovation.

While the parties have agreed to this settlement in full, I would be remiss if I did not point out that there are elements of this settlement that do cause concern. The establishment of the 3-person technical review committee is the closest we have come to regulation of innovation in this industry. It's unprecedented that this panel will be housed at Microsoft's headquarter. It may also investigate any complaint received by interviewing any Microsoft employee it deems relevant. This kind of power will impact the way Microsoft does business.

We hope that with this panel in place, Microsoft will be able to develop products and move them to the market in a timely manner. As this case has shown, technology moves at the speed of light. This country has benefited from the pace of technological development. Whether a rapid series of upgrades available for operating systems, or the increase in usefulness coupled with a significant decline in price that allowed millions of people the ability to take advantage of the digital revolution, the entire country has benefited from the speed at which this industry produces products. The role this review committee plays will be key to this settlement working in a positive manner and not a negative one.

It should not be open to abuse by competitors in an effort to stymie Microsoft's ability to develop new products nor should it move beyond its scope of review called for in the settlement. Any delay in the development process at Microsoft will hurt consumers. Denial of technological innovation will increase the cost for consumers. These costs will be out of pocket as Microsoft will be forced to pass the cost of compliance on to consumers in the form of price hikes. And there will be costs associated with a loss of productivity. One of the reasons we witnessed a "boom" in our economy is the last 10 years was because of the tremendous productivity gains our economy realized as the result of technology. We must ensure that these gains are still possible by allowing technology to reach market in a short period of time.

Another area of concern is the wide latitude that OEM's will be given when it comes to the design of the desktop. This stipulation can result in more competitors' products available on the desktop as consumer work more closely with OEM to customize their operating systems. While allowing for more choices in software during the out of box experience can be beneficial for consumers, there is concern that the desktop will become nothing but a source of revenue for computer manufacturers. Cluttering the desktop with icons of the highest bidders, while good for some OEM's bottom line, could have a negative impact on the computing experience for consumers. One of the key developments in computing that led to widespread use was the transition from DOS to a graphical user interface (GUI). With an operating system that made the interaction simpler for the user, more computers were sold.

Increases in the usability of computers and decreases in price are just two factors that caused millions of consumers to have access to one or more

computers. We need to be sure that computers remain easy to use so that we can continue the wide adoption rate we have seen in the last ten years. Littering the desktop may cause confusion and lead to a negative experience.

Noting these concerns we still believe that, on balance, this is a good settlement. This case has consumed millions of taxpayer dollars while having a direct negative effect on consumers. Investors have lost billions as pension funds and investment accounts have been devastated by the decline in the tech sector. The uncertainty surrounding this case is evident in the chart detailing the stock performance of some major technology companies involved in the case. Everyone has suffered to some extent. While this case is not the only factor in the tech sector's decline, it has played a role.

Much has been written about the tremendous impact the collapse of Enron has had on the markets and investors. The chart just shows you that Enron is a drop in the bucket compared to what has happened to technology investors.

On behalf of our members and our coalition partners, we encourage the Department of Justice to continue its tremendous efforts on behalf of settlement and hope you urge the District Court to approve this settlement in the public interest.

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